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# Originalism and the Criminal Law: Vindicating Justice Scalia's Jurisprudence - and the Constitution

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# ORIGINALISM AND THE CRIMINAL LAW: VINDICATING JUSTICE SCALIA’S JURISPRUDENCE—AND THE CONSTITUTION

*Adam Lamparello\* and Charles E. MacLean\*\**

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*If I have brought any message today, it is this: Have the courage to  
have your wisdom regarded as stupidity . . . And have the courage to  
suffer the contempt of the sophisticated world.*

Justice Antonin Scalia

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## I. INTRODUCTION

*The Court must be living in another world. Day by day, case by  
case, it is busy designing a Constitution for a country I do not  
recognize.*<sup>1</sup>

The answer to the question of whether the late Justice Antonin Scalia is a friend or foe of criminal law and procedure is *neither*. Justice Scalia was an intellectually honest jurist and the outcomes he reached were based on the Constitution's text and original meaning, not on subjective values.<sup>2</sup>

Scholars throughout the legal academy have overwhelmingly criticized Justice Scalia for his stinging dissents in cases such as *Planned Parenthood v. Casey*, *United States v. Windsor*, and *Obergefell v.*

1. Fr. Frank Pavone, *A Country He Did Not Recognize: A Reflection On The Passing of Justice Antonin Scalia*, Breitbart, <http://www.breitbart.com/big-government/2016/03/03/a-country-he-did-not-recognize-a-reflection-on-the-passing-of-justice-antonin-scalia/> (last visited Feb. 1, 2017).

2. See Adam Lamparello and Charles E. MacLean: *It's The People's Constitution, Stupid: Two Liberals Pay Tribute to Antonin Scalia's Legacy*, 45 U. MEMPHIS L. REV. 281 (2014).

*Hodges*, where Justice Scalia chastised the majority for ignoring the Constitution's text to reach an outcome that the language of the constitutional provision at issue—the Fourteenth Amendment—could not possibly support.<sup>3</sup> In fact, some commentators have gone so far as to describe Justice Scalia as racist, bigoted, and homophobic, primarily because they disagree strongly with the *outcomes* that Scalia reached in these and other cases.<sup>4</sup> For these scholars, the interpretive theory on which Justice Scalia relied—originalism—is vacuous in theory and in application and is designed to provide Justice Scalia's conservative policy agenda with the thin veneer of legitimacy.<sup>5</sup> Perhaps the lack of conservative professors on most law faculties is contributing to such largely unchallenged groupthink, the essence of which embraces an ends-justifies-the-means approach in which the desirability of an outcome justifies manipulating, even ignoring, the Constitution's text.<sup>6</sup> As discussed in this article, such scholars view the courts, not the legislature or democratic process, as the forum within which to achieve substantive policy changes. Simply put, if the Court's outcome does not accord with their policy predilections, then the Justices in the majority—and the interpretive theory upon which they rely—must be flawed. The reality is that it is the other way around. Those who are focused on outcomes and willing to do anything to achieve them embrace an approach to constitutional interpretation that is flawed in theory, fatal in fact, and undemocratic at its core. The authors are by no means conservative, but we know that we have no monopoly on truth, and no authority to define what is 'right' for everyone. Make no mistake: we do not agree with the outcomes Justice Scalia reached in many cases, but we respect the process by which he reached those outcomes.

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3. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *United States v. Windsor*, 133 S. Ct. 2675 (2012); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also U.S. Const., amend. XIV, § 1 (providing in relevant part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

4. See, e.g., Barney Frank, *Justice Scalia Is A Homophobe*, Politico, (June 26, 2015), available at: <http://www.politico.com/magazine/story/2015/06/justice-scalia-gay-marriage-ruling-119480>; Bridget Todd, *Tell Justice Scalia: Apologize For Your Racist Comments About The Fourteenth Amendment*, available at: <https://www.credomobilize.com/petitions/tell-antonin-scalia-apologize-for-your-foul-remarks-on-race>

5. See, e.g., Jeffrey Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83 (2010).

6. See Tax Prof Blog, *Why Are There So Few Conservative/Libertarian Law Profs, Even Though They Are More Productive Scholars Than Liberal Law Profs?* (May 16, 2016), available at: [http://taxprof.typepad.com/taxprof\\_blog/2016/05/why-are-there-so-few-conservativelibertarian-law-profs-even-though-they-are-more-productive-scholars-than-liberal-law-profs.html](http://taxprof.typepad.com/taxprof_blog/2016/05/why-are-there-so-few-conservativelibertarian-law-profs-even-though-they-are-more-productive-scholars-than-liberal-law-profs.html).

Let's face it: an outcome-driven model of constitutional interpretation results in decisions that are based upon little more than a bare majority of the Justices' subjective policy preferences. As discussed below, in *Griswold v. Connecticut*, the Court, after conceding that the Constitution did not support the outcome it reached, invented constitutional "penumbras" to invalidate a ban on contraception and to form the basis for creating additional unenumerated rights in the future.<sup>7</sup> Similarly, in *Planned Parenthood*, the Court, by a 5-4 margin, re-affirmed *Roe v. Wade* based on a previously undiscovered right "to define one's own concept of existence . . . and the mystery of human life."<sup>8</sup> Of course, none of these "rights" can be found anywhere in the Constitution. They can be found, however, in transcendent dimensions of dishonesty, hidden under the fragile but transparent veneer of flowery rhetoric disguised as constitutional legitimacy.

Yet, critics of Justice Scalia, who criticize originalism yet countenance outright distortions of the Constitution's text, celebrate these decisions, along with the constitutionally indefensible doctrine of substantive due process and the laughable interpretive theory known as "living constitutionalism," which states that constitutional meaning changes based on contemporary norms and thus countenances primarily moral readings of the Constitution.<sup>9</sup> In other words, the Constitution's meaning changes to achieve the political will of a bare majority of the Justices. This might be acceptable if it occurred in a kangaroo court, but

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7. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Planned Parenthood*, 505 U.S. at 851.

9. See, e.g., Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1180 (2009). Judge Sutton states as follows: One of the great debates in American legal history is whether judicial alterations of the Constitution in the face of the exigencies of the moment represent a good or a bad thing—or indeed whether certain landmark decisions changed the meaning of the Constitution. Yet good or bad, a changeable Constitution, all can agree, presents risks—risks of putting a singular power, a Framer's pen, in the hands of five sitting Justices. One school of thought, perhaps seeing what has happened over the last 200 years, chooses to recognize the undeniable—that the meaning of the Constitution has changed—and opts to embrace it. Of course the meaning of the Constitution changes, they say, and of course it will be a majority of the Supreme Court who decides when it changes. The Constitution, after all, was a blue print of government, not a Napoleonic legal code, and its "majestic generalities" were meant to adapt to and be adaptable for different ages, different circumstances, even different world views.<sup>48</sup> Sized up in this way, the U.S. Constitution is a living document, not a dead one; it changes with each generation, permitting constructions of the document in one era to be discarded in the next; and it is fanciful to think otherwise. These are the "living constitutionalists": Words, they say, require flexible interpretation, and there is nothing wrong with the meaning of words changing over time, especially where that change reflects a shift in public consensus about an issue.

not in the United States Supreme Court. Of course, what such “theories” *really* countenance is an approach to judicial decision-making in which judges arrive at whatever result they deem most desirable and conceal their subjectivity under a rhetorical gloss that masquerades as legal reasoning. After all, under what provision in the Constitution can one reasonably infer that the “right” to “liberty” under the Fourteenth Amendment encompasses “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” or that an asserted rights claim can implicate liberty “in its spatial and more transcendent dimensions”?<sup>10</sup> Then again, why should the Constitution matter when the Justices have life-tenure and, as cases such as *Griswold* and *Roe* suggest, not even the pretense of accountability? Well, because these approaches undermine democracy, the rule of law, the Court’s institutional legitimacy, and give the few the right to decide what is within the province of the people.

Of course, these decisions are anything but legitimate, and the consistent decline in the Court’s popularity, coupled with the increased politicization of the judiciary, which has transformed the judicial nomination process into a modern-day soap opera, underscores this fact.<sup>11</sup> Yet, many scholars and commentators continue to celebrate this nonsense—and vilify Justice Scalia—while refusing to admit what any reasonable jurist already knows: living constitutionalism is a sham and a threat to the bedrock principles of democracy, including separation of powers, federalism, de-centralization, and bottom-up lawmaking. On the other hand, Justice Scalia’s jurisprudence (and originalism itself) does not produce intellectually dishonest, outcome-based, value-driven, and politically-motivated decisions.

This article will focus on Justice Scalia’s originalist approach to constitutional interpretation in the context of criminal law and procedure. An examination of Justice Scalia’s jurisprudence demonstrates that, more often than not, he agrees with that proposition and has reached outcomes that are entirely at odds with his conservative policy predilections, that benefit criminal defendants, flag burners, and arrestees, and that faithfully apply the Constitution’s text.<sup>12</sup> For example,

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10. *Planned Parenthood*, 505 U.S. at 851; *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

11. See NBC News, *Replacing Scalia: A Look Back At Some of the Rockiest Supreme Court Nominations*, available at: <http://www.nbcnews.com/politics/supreme-court/after-death-justice-scalia-look-back-5-rockiest-supreme-court-n519731>.

12. See *Texas v. Johnson*, 491 U.S. 397 (1989), *infra* notes 177-78; see also *U.S. v. Jones*, 565 U.S. 400 (2012), *infra* notes 51-56; see also *Crawford v. Washington*, 541 U.S. 36 (2004), *infra* notes 105-114.

Justice Scalia's opinions in cases involving the Confrontation Clause and the Fourth and Fourteenth Amendments strengthened constitutional protections for criminal defendants (and arrestees) and were consistent with the Constitution's text and underlying purposes.<sup>13</sup> Justice Scalia's opinions illustrate that it is possible to reach desirable outcomes through an intellectually honest decision-making process, and that originalism is a legitimate vehicle by which to achieve both objectives. The same cannot be said for the *Roe*, *Griswold*, and *Obergefell* majorities. As Harvard Law Professor Lawrence Tribe—a liberal-leaning constitutional law scholar—said when discussing *Roe*, “[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”<sup>14</sup> That fact should trouble citizens of all political persuasions.

In the area of criminal law and procedure, Justice Scalia's jurisprudence demonstrates that he correctly rejects “living constitutionalism,” which enables judges “to roam where unguided speculation might take them,” and results in decisions that only Anthony Kennedy, who invented a right to “equal dignity” under the law, would support.<sup>15</sup> At bottom, the text is there for a reason—to safeguard against the abuse of judicial power and, concomitantly, the usurpation of the democratic process. After all, one judge's view of justice may be another's prescription for injustice, just as one man's terrorist is another man's freedom fighter. Justice Scalia's approach to constitutional interpretation is a testament to the fact that the Court's “reasoned judgment” in the “heady days of the here and now” has led to indefensible outcomes that have undermined the Supreme Court's legitimacy, American constitutionalism, participatory democracy, and the rule of law.<sup>16</sup> Originalism has proven to be the most objective and neutral interpretive theory. Its application by Justice Scalia in the face of constant criticism and vilification should be viewed as a great feat that has advanced American jurisprudence. Thus, scholars and commentators who chastise Justice Scalia should first look in the mirror—they might discover that they embody precisely what they condemn.

This article will analyze the utility of originalist constitutional interpretation as well as some of the most influential opinions of which

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13. *Id.*

14. Laurence Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973); see also John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

15. *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997).

16. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

Justice Scalia was a part. Part II will discuss Justice Scalia's originalist approach in contrast to the "living constitution" approach. Part III will analyze how Justice Scalia's devotion to originalism benefited criminal law. Part IV will discuss the legacy that Justice Scalia has left in his body of case law and how it has and will continue to positively impact the law as a whole.

## II. ORIGINALISM—NOT LIVING CONSTITUTIONALISM—IS THE ENDURING THEORY OF CONSTITUTIONAL INTERPRETATION

*Sometimes people come up to me and inquire, "Justice Scalia, when did you first become an originalist?" As though it's some weird affliction, you know, "When did you start eating human flesh?"*<sup>17</sup>

Many scholars have criticized Justice Scalia's originalism over the years, but the reason for such criticism is as meritless as the arguments supporting living constitutionalism.<sup>18</sup> Those who have levied such criticisms against Justice Scalia often cite originalism as interpretive theory upon which Justice Scalia relies to reach pre-ordained outcomes that are consistent with his conservative "right-wing" agenda.<sup>19</sup> Yet, upon closer analysis, nothing could be further from the truth. Justice Scalia has regularly arrived at outcomes that are often contrary to his political and ideological values, and Scalia has done so by focusing on the *process* by which decisions are made, not upon the outcomes that he thinks *should* be reached. In other words, Justice Scalia believes that, although the Court has the power to say what the law *is*, it does not have the power to say what the law *should* be.<sup>20</sup> Unfortunately, and as

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17. Charlie Spiering, *31 Of Supreme Court Justice Antonin Scalia's Greatest Quotes* (Feb. 13, 2016), Breitbart, available at: <http://www.breitbart.com/big-government/2016/02/13/supreme-court-justice-antonin-scalias-greatest-quotes/>.

18. See, e.g., Richard Posner, *The Incoherence of Antonin Scalia*, New Republic, (Aug. 24, 2012), available at: <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>

19. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is*, 83 GEO. L.J. 217, 222 (1994) ("the presumption should be that the power 'to say what the law is' is not authoritatively vested in a single body with final, unreviewable authority to decide all issues for all time").

20. See, e.g., Jack Rakove, *Joe The Ploughman Reads The Constitution, Or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578 (2011). Professor Rakove states as follows:

[O]riginalism is the theory of constitutional interpretation that says that the meaning of a constitutional text or provision is locked into it at the moment of adoption, and the proper goal of constitutional interpretation is to ascertain and apply that meaning to the case at hand. In a republic in which the adoption of a constitutional text depends directly



discussed below, the same cannot be said for other members of the Supreme Court, such as Justice Anthony Kennedy, who consciously manipulate or ignore the Constitution's text to reach outcomes predicated primarily, if not exclusively, on their subjective policy predilections.

By way of background, originalism, which rightfully remains a dominant theory in constitutional interpretation (thanks to Justice Scalia), is neither complex nor controversial. The basic premise is that the Court should ascribe meaning to the Constitution's text that is consistent with its commonly understood meaning at the time the Constitution was adopted.<sup>21</sup> Originalism has many variants, and some scholars have embraced a less stringent version of originalism, arguing that the Court should arrive at a *reasonable* meaning of the text based on either an original *or* contemporary understanding of the words.<sup>22</sup> Under this view, the basic premise is the same: the Court should not ascribe meaning to the Constitution's text that its words cannot reasonably bear.<sup>23</sup> Implicit in this approach is the notion of *honesty* in decision-making; the Court should not manipulate or ignore the Constitution's text to achieve pre-determined outcomes, no matter how desirable. Doing so gives the Court nearly unbridled authority to invent "rights" in the future, removes the constraints on its Article III reviewing authority, and undermines the fundamental precepts upon which a democratic republic is predicated: federalism, separation of powers, decentralization, and bottom-up lawmaking.

Yet, many commentators have criticized originalism, not primarily because of its theoretical underpinnings, but because they dislike the

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on the authority of the people, knowing how a text was understood by both ordinary citizens and their elected delegates and legislators matters more than the original intentions of its authors.

21. See, e.g., Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 10 (2009). Professor Berman states as follows:

Probably the most immediately recognizable originalist thesis holds that, whatever may be put forth as the proper focus of interpretive inquiry (framers' intent, ratifiers' understanding, or public meaning), that object should be the sole interpretive target or touchstone. Call this subtype of strong originalism "exclusive originalism." It can be distinguished from a sibling view that is a shade less strong—viz., that interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence. Call this marginally more modest variant of strong originalism "lexical originalism."

22. See *id.*

23. See *id.*

*outcomes* that it produces in some cases.<sup>24</sup> Interestingly, though, those (including some Justices) who argue that Justice Scalia's jurisprudence is outcome-driven (as discussed below, it is not) and who embrace "living constitutionalism," which states that the Constitution's meaning changes over time based on contemporary values,<sup>25</sup> are the ones whose approach to constitutional interpretation is outcome-focused and agenda-driven. For example, consider the Fourteenth Amendment, which states in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>26</sup>

A reasonable interpretation of this language suggests that states cannot impose the death penalty, imprisonment, or forfeiture penalties on any citizens *unless* there are adequate *procedures* to prevent arbitrary and unfair punishments.

However, some Justices on the Court, often by bare 5-4 majorities, along with commentators who embrace "living constitutionalism," have manipulated or entirely disregarded this language to *infer* (and therefore invent) *substantive* rights under the Fourteenth Amendment.<sup>27</sup> For example, in *Roe v. Wade*, the majority relied on an *unenumerated* "right" to privacy that the Court inferred from the Fourteenth Amendment, despite the fact that the Amendment's language could not possibly support such an interpretation.<sup>28</sup> In *Planned Parenthood*, the Court, per Justice Kennedy, re-affirmed *Roe* based on a previously undiscovered "right" "to define one's own concept of existence. . . and the mystery of human life."<sup>29</sup> Justice Kennedy did so despite conceding that a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty.<sup>30</sup> Well, it does suggest that.

Likewise, in *Lawrence v. Texas*, the Court held that a statewide ban on sodomy among same-sex couples violated the judicially-created right to "liberty both in its spatial and in its more transcendent

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24. See *id.* at 7, 22.

25. See Sutton, *supra* note 9, at 1180.

26. See U.S. Const., amend. XIV.

27. See *Roe v. Wade*, 410 U.S. 113, 116-67 (1973).

28. *Id.* at 152-56.

29. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

30. *Id.* at 846.

dimensions” (not in any dimension of the Constitution).<sup>31</sup> In *Obergefell*, a so-called “right” to “equal dignity” (not equal protection) under the law supported recognition of a right to same-sex marriage.<sup>32</sup> No credible jurist could claim that the Fourteenth Amendment’s words support such outlandish interpretations—and none do. That may be why the Court felt the need to discover invisible constitutional “penumbras” in *Griswold*, invent a right to define “the mysteries of human life” in *Planned Parenthood*, and in *Lawrence* countenance a transcendent right to liberty. What is more, and what is profoundly interesting, is that in each of these cases, the Justices in the majority reached outcomes that, strangely, coincided with their personal views.<sup>33</sup> That is, well, interesting.

To make matters worse, in these cases the Court’s decisions were predicated on blatant distortions and manipulations of the Constitution’s text, gave the Court nearly unfettered authority to invent unenumerated “rights” in future cases, replaced de-centralization with centralization, concentrated rather than separated federal power, and undermined citizens’ ability to truly participate in democracy.<sup>34</sup> Put simply, the very scholars who criticize Justice Scalia as an outcome-focused, agenda-driven conservative should first look in the mirror and realize that they—not Justice Scalia—embody precisely what they criticize. That underscores the problem with “living constitutionalism” and outcome-focused decision-making: it is fundamentally dishonest and results in the perception that judges decide cases based on subjective values, not constitutional imperatives. It also lends credence to the words of former Justice Charles Evans Hughes, who stated that, “[a]t the constitutional level where we work, 90 percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilection.”<sup>35</sup>

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31. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

32. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2675 (2012).

33. *See Roe*, 410 U.S. at 116-67; *see also Planned Parenthood*, 505 U.S. at 851, 846; *Lawrence*, 539 U.S. at 562.

34. *See, e.g.,* Martin Edelman, *Written Constitutions, Democracy, & Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 594 (2005).

At the turn of the twentieth century, James Bradley Thayer helped to shift the terms of the debate to judicial activism versus judicial self-restraint. Thayer saw democracy operating solely through the elected agencies of government. Therefore, when the non-elected judiciary failed to defer to the policy choices of those agencies—failed to restrain their use of judicial review to negate those policies—the judges were thwarting the workings of democracy. As Justice Felix Frankfurter later wrote: “In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint.”

35. *See* Melvin Urofsky, *William O. Douglas As a Common Law Judge*, 41 DUKE L.J. 133,

That comment should trouble citizens of all political persuasions.

In any event, the best way to test whether Justice Scalia was an outcome-focused jurist who manipulated the Constitution to advance his ideological predilections is to analyze his jurisprudence. Before doing so, however, Justice Scalia's background—particularly his political and ideological values—must be accurately categorized. By most accounts, Scalia, who was appointed to the Court by President Ronald Reagan, embraced conservatism and traditional moral values, was a devout Roman Catholic, and advocated for interpreting the Constitution based on its original meaning.<sup>36</sup> Scalia's decisions, however, were arguably contrary to these values equally as much as they were consistent with them.

In fact, as the discussion below demonstrates, Justice Scalia frequently arrived at outcomes that were directly at odds with his political values and were produced through reasoning that maintained fidelity to the Constitution and remained mindful of the Court's role in American democracy. The same cannot be said of the majority in *Griswold*, *Roe*, *Planned Parenthood*, *Lawrence*, and *Obergefell*, where the Court's outcomes were a matter of political convenience rather than constitutional conviction, and where the rule of law was trumped by the rule of oligarchs.

### III. JUSTICE SCALIA'S ORIGINALISM AND ITS IMPACT ON THE CRIMINAL LAW—AND CRIMINAL DEFENDANTS

Given Justice Scalia's background as a conservative thinker who embraced traditional Judeo-Christian moral values, one would think that his decisions in the criminal law context would be pro-law enforcement and anti-criminal defendant.<sup>37</sup> However, upon closer examination, the opposite is true—Justice Scalia's decisions often safeguarded privacy rights against law enforcement's investigatory practices and resulted in enhanced protections at trial for criminal defendants.<sup>38</sup>

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137-38 (1991) (quoting WILLIAM O. DOUGLAS, *THE COURT YEARS* at 3 (1980)).

36. *Antonin Scalia*, Oyez, [https://www.oyez.org/justices/antonin\\_scalia](https://www.oyez.org/justices/antonin_scalia) (last visited Feb 8, 2017).

37. *Id.*

38. See, e.g., Stephanos Bibos, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, The Unlikely Friend of Criminal Defendants?* 94 GEO. L.J. 183 (2005).

### A. Justice Scalia's Originalism in The Fourth Amendment Context

In the Fourth Amendment context, Justice Scalia's jurisprudence has repeatedly re-affirmed the original purposes of the Fourth Amendment and led to decisions that *benefitted* criminal defendants and *limited* law enforcement's authority.

#### 1. *Kyllo v. United States*: What Constitutes a Search of a Home

In *Kyllo*, writing for a majority of the Court, Justice Scalia held that the use of sense-enhancing technology to gather any information concerning the interior of a residence, if the information could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a "search" under the Fourth Amendment and therefore requires probable cause and a warrant (absent a recognized exception to the warrant requirement).<sup>39</sup> In addition, Justice Scalia held that the use of thermal imaging to measure heat emanating from a home also constituted a search under the Fourth Amendment.<sup>40</sup>

In support of this holding, Justice Scalia emphasized that, "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."<sup>41</sup> Accordingly, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."<sup>42</sup> Justice Scalia conceded that the "permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass," and "[v]isual surveillance was unquestionably lawful because 'the eye cannot by the laws of England be guilty of a trespass.'"<sup>43</sup> However, Justice Scalia recognized that technological advances posed threats to privacy in a manner that did not previously exist. As Justice Scalia noted, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," as technology "enabling human flight has exposed to public view. . . uncovered portions of the house and its curtilage that once were private."<sup>44</sup>

Furthermore, Justice Scalia rejected the argument that thermal

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39. *Kyllo v. United States*, 533 U.S. 27, 28 (2001).

40. *See id.*

41. *See id.* at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

42. *Id.*

43. *Id.*

44. *Id.* at 33-34.

imaging was reasonable because it did not “detect private activities occurring in private areas,”<sup>45</sup> stating that “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”<sup>46</sup> Rather, prior cases “made clear that any physical invasion of the structure of the home, ‘by even a fraction of an inch,’ was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor.”<sup>47</sup> Indeed, in the home, “our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.”<sup>48</sup>

In so holding, Justice Scalia emphasized that the decision was grounded in the Fourth Amendment’s original purposes:

We have said that the Fourth Amendment draws “a firm line at the entrance to the house.” That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no “significant” compromise of the homeowner’s privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.<sup>49</sup>

For these reasons, when “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”<sup>50</sup>

## 2. *United States v. Jones*: What Constitutes a Search of Property

In *Jones*, the Court, per Justice Scalia, held that the use of a GPS tracking device to monitor a suspect’s movements on a public highway constituted a search under the Fourth Amendment.<sup>51</sup> Scalia stated that:

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion

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45. *Id.* at 37.

46. *Id.*

47. *Id.*

48. *Id.* (emphasis in original).

49. *Id.* at 40 (internal citations omitted).

50. *Id.*

51. *United States v. Jones*, 565 U.S. 400, 404 (2012).

would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted . . . is a “case we have described as a ‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law’” with regard to search and seizure.<sup>52</sup>

Scalia also explained that “[t]he text of the Fourth Amendment reflects its close connection to property, because otherwise it would have referred simply to ‘the right of the people to be secure against unreasonable searches and seizures’; the phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.”<sup>53</sup>

In support of this holding, Justice Scalia connected Fourth Amendment violations to both property and common-law trespass, holding that “our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.”<sup>54</sup> In recent decades, the Court, applying *Katz v. United States*, had focused on the issue of whether an alleged search was subjectively and objectively reasonable.<sup>55</sup> However, Justice Scalia refused to endorse the *Katz* rationale exclusively, asserting that the approach was consistent with the original purposes underlying the Fourth Amendment:

The concurrence begins by accusing us of applying “18th-century tort law.” That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply exclusively *Katz*’s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.<sup>56</sup>

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52. *Id.* at 404-05 (internal citations omitted).

53. *Id.*

54. *Id.*

55. *Id.* at 406; *see also* *Katz v. United States*, 389 U.S. 347, 358-59 (1967) (holding that a warrantless search is unlawful if it violates a suspect’s reasonable expectation of privacy).

56. *Jones*, 565 U.S. at 411-13. Justice Scalia also refused to rely solely on *Katz* when assessing the constitutionality of searches under the Fourth Amendment:

In fact, it is the concurrence’s insistence on the exclusivity of the *Katz* test that needlessly leads us into “particularly vexing problems” in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in *Knotts* that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” Thus, even assuming that the concurrence is correct to say that “[t]raditional surveillance” of Jones for a 4-week period “would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,” our cases suggest that such visual observation is constitutionally permissible. It may be that

### 3. *Maryland v. King*: Invasion of Privacy Through a Buccal Swab “Search”

In *Maryland v. King*, the Court held that the use of a buccal swab to obtain a defendant’s DNA sample after arrest was reasonable under the Fourth Amendment.<sup>57</sup> Justice Scalia vigorously dissented, emphasizing that this practice constituted a severe—and unconstitutional—invasion of a defendant’s privacy. Scalia stated as follows:

At the time of the Founding, Americans despised the British use of so-called “general warrants”—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application. The first Virginia Constitution declared that “general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed,” or to search a person “whose offence is not particularly described and supported by evidence,” “are grievous and oppressive, and ought not be granted.”<sup>58</sup>

Justice Scalia also argued that the decision was inconsistent with

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achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question. And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that “relatively short-term monitoring of a person’s movements on public streets” is okay, but that “the use of longer term GPS monitoring in investigations of *most offenses*” is no good. (emphasis added). That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is “surely” too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an “extraordinary offens[e]” which may permit longer observation. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these “vexing problems” in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here. (internal citations omitted).

57. *Maryland v. King*, 133 S. Ct. 1958, 1964-965 (2013).

58. *Id.* at 1980-81. Justice Scalia further stated:

Madison’s draft of what became the Fourth Amendment answered these charges by providing that the “rights of the people to be secured in their persons . . . from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause . . . or not particularly describing the places to be searched.” As ratified, the Fourth Amendment’s Warrant Clause forbids a warrant to “issue” except “upon probable cause,” and requires that it be “particula[r]” (which is to say, *individualized*) to “the place to be searched, and the persons or things to be seized.” And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment’s general prohibition of “unreasonable” searches imports the same requirement of individualized suspicion. (internal citations omitted).



the Court's precedent, which had only allowed suspicionless searches to serve the *special*, not *general*, needs of law enforcement.<sup>59</sup> Noting that "[a]lthough there is a 'closely guarded category of constitutionally permissible suspicionless searches,' Justice Scalia explained that this never included searches designed to serve 'the normal need for law enforcement.'"<sup>60</sup> Indeed, "[e]ven the common name for suspicionless searches—'special needs' searches—itself reflects that they must be justified, always, by concerns 'other than crime detection.'"<sup>61</sup> As Justice Scalia explained, the Court previously "approved random drug tests of railroad employees . . . but only because the Government's need to 'regulat[e] the conduct of railroad employees to ensure safety' is distinct from 'normal law enforcement.'"<sup>62</sup> In addition, the Court has "approved suspicionless searches in public schools—but only because there the government acts in furtherance of its 'responsibilities . . . as guardian and tutor of children entrusted to its care.'"<sup>63</sup>

Moreover, although Justice Scalia conceded that "the Court is correct to note that there are instances in which we have permitted searches without individualized suspicion," he noted that "[i]n none of these cases . . . did we indicate approval of a [search] whose primary purpose was to detect evidence of ordinary criminal wrongdoing."<sup>64</sup> Scalia stated as follows:

The Court hastens to clarify that it does not mean to approve invasive surgery on arrestees or warrantless searches of their homes. That the Court feels the need to disclaim these consequences is as damning a criticism of its suspicionless-search regime as any I can muster. And the Court's attempt to distinguish those hypothetical searches from this real one is unconvincing. We are told that the "privacy-related concerns" in the search of a home "are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." But why are the "privacy-related concerns" not also "weighty" when an intrusion into the body is at stake? (The Fourth Amendment lists "persons" first among the entities protected against unreasonable searches and seizures.) And could the police engage, without any suspicion of wrongdoing, in a "brief and . . . minimal" intrusion into the home of an arrestee—perhaps just peeking

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59. *Id.*

60. *Id.* at 1981 (quoting *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989)).

61. *Id.*

62. *Id.* (internal citations omitted).

63. *Id.*

64. *Id.* at 1981-82.

around the curtilage a bit? Obviously not.<sup>65</sup>

Notwithstanding, Justice Scalia noted that “this discussion is beside the point,” because “[n]o matter the degree of invasiveness, suspicionless searches are never allowed if their principal end is ordinary crime-solving.”<sup>66</sup>

For these reasons, Justice Scalia concluded that the Founders would have likely found the search at issue contrary to the original purpose of the Fourth Amendment:

Today’s judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the “identity” of the flying public), applies for a driver’s license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.<sup>67</sup>

Thus, “[s]olving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches.”<sup>68</sup>

#### 4. *Navarette v. California*: Reasonable Suspicion in Relation to an Anonymous Tip

In *Navarette*, the Court held that an anonymous tip from a 911 caller reporting that a vehicle had driven the caller off the road was sufficient to establish reasonable suspicion and therefore justify a stop of the vehicle.<sup>69</sup> In support of this holding, the majority, per Justice Thomas, stated that the call “bore adequate indicia of reliability for the

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65. *Id.* at 1982. (internal citations omitted).

66. *Id.* Justice Scalia also noted:

DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court’s purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid (“official investigation into a crime”). Against all of that, it is safe to say that if the Court’s identification theory is not wrong, there is no such thing as error.

*Id.* at 1986.

67. *Id.* at 1989.

68. *Id.*

69. *Navarette v. California*, 134 S. Ct. 1683, 1685 (2014).

officer to credit the caller's account."<sup>70</sup> Specifically, "[b]y reporting that she [the caller] had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving," and "[t]hat basis of knowledge lends significant support to the tip's reliability."<sup>71</sup> Justice Thomas also explained there was "reason to think that the 911 caller in this case was telling the truth," because the caller reported the incident shortly after it had occurred.<sup>72</sup> As Justice Thomas explained, "we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because 'substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.'"<sup>73</sup> Furthermore, the caller reported an incident that suggested the driver was engaged in criminal activity:

The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.<sup>74</sup>

For these reasons, the Court found "the indicia of reliability . . . sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road."<sup>75</sup>

Justice Scalia wrote a blistering dissent, arguing that an anonymous 911 call, which merely reported an alleged traffic violation, is plainly insufficient to establish reasonable suspicion that the driver was engaged in criminal activity:

The Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless

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70. *Id.* at 1688.

71. *Id.* at 1689.

72. *Id.*

73. *Id.* (quoting Advisory Committee's Notes on FED. RULE EVID. 803(1), 28 U.S.C. App., p. 371).

74. *Id.* at 1691.

75. *Id.* at 1692.

driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police. If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim's.<sup>76</sup>

Furthermore, the majority's holding was predicated on the unsupported assumption that the driver was engaged in criminal activity:

All that has been said up to now assumes that the anonymous caller made, at least in effect, an accusation of drunken driving. But in fact she did not. She said that the petitioner's truck "[r]an [me] off the roadway." That neither asserts that the driver was drunk nor even raises the likelihood that the driver was drunk. The most it conveys is that the truck did some apparently nontypical thing that forced the tipster off the roadway, whether partly or fully, temporarily or permanently. Who really knows what (if anything) happened? The truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian.<sup>77</sup>

Simply put, "in order to stop the petitioners the officers here not only had to assume without basis the accuracy of the anonymous accusation but also had to posit an unlikely reason (drunkenness) for the accused behavior."<sup>78</sup> For these reasons, Justice Scalia concluded that, although "[d]runken driving is a serious matter . . . so is the loss of our freedom to come and go as we please without police interference."<sup>79</sup> Unfortunately, "[a]fter today's opinion all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving."<sup>80</sup>

##### 5. *Riley v. California*: Searches of Cell Phones

In *Riley*, Justice Scalia joined a unanimous Court in holding that warrantless searches of cellular telephones were not permitted under the search incident to arrest doctrine, which authorized limited searches of an arrestee to protect officer safety and prevent the destruction of

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76. *Id.* at 1697 (Scalia, J., dissenting).

77. *Id.* at 1695. (internal citation omitted).

78. *Id.*

79. *Id.* at 1697.

80. *Id.*

evidence, and thus violated the Fourth Amendment.<sup>81</sup> To begin with, the Court held that searches of cell phones were fundamentally different than searches of finite objects that might be found on an arrestee or in a motor vehicle:

The term “cell phone” is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.<sup>82</sup>

Furthermore, “[i]nternet search and browsing history . . . can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.”<sup>83</sup> In addition, cell phones have immense storage capacity and thus implicate privacy protections in a manner that searches of finite objects (e.g. plastic containers, cigarette packs) do not:

[A] cell phone’s capacity allows even just one type of information to convey far more than previously possible. The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would

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81. *Riley v. California*, 134 S. Ct. 2473, 2477 (2014); *see also* *Chimel v. California*, 395 U.S. 752, 762-63 (1967). In *Chimel*, the Court created the search-incident-to-arrest doctrine, which allows warrantless searches of an arrestee’s person to protect officer safety and preserve evidence:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee’s person and the area “within his immediate control”—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

*Id.* at 762-63. In the years following *Chimel*, the Court expanded *Chimel* to allow virtually all warrantless searches incident to arrest, even if safety and evidence preservation were not implicated. *See, e.g.*, *New York v. Belton*, 453 U.S. 454, 454 (1981) (expanding *Chimel* to hold that law enforcement officers may search the passenger compartment of an arrestee’s vehicle).

82. *Riley*, 134 S. Ct. at 2489.

83. *Id.* at 2490.

routinely be kept on a phone.<sup>84</sup>

Indeed, the importance of protecting citizens from such intrusive, wide-ranging, and non-particularized searches was “one of the driving forces behind the Revolution itself,” and led the Founders to adopt the Fourth Amendment.<sup>85</sup> As the majority noted, “the Fourth Amendment was the founding generation’s response to the reviled “general warrants” and “writs of assistance” of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.”<sup>86</sup>

### *B. Justice Scalia’s Originalism in The Sixth Amendment Context*

In the Sixth Amendment context, Justice Scalia has repeatedly reached decisions that protect an accuser’s right to confront witnesses at trial, thus benefitting criminal defendants.

#### 1. *Maryland v. Craig*: Confrontation Clause in Relation to a Child Witness

In *Maryland*, the Court held, per Justice O’Connor, that the Sixth Amendment’s Confrontation Clause did not prohibit a child witness in an abuse case from testifying against a defendant at trial outside the defendant’s presence through a one-way closed circuit television.<sup>87</sup> Holding that the appropriateness of doing so must be made on a case-by-case basis, the Court stated that “[w]e have never held . . . that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.”<sup>88</sup>

The majority emphasized that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact”:<sup>89</sup>

[T]he right guaranteed by the Confrontation Clause includes not only a “personal examination,” but also “(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the

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84. *Id.* at 2491.

85. *Id.* at 2494.

86. *Id.*

87. *Maryland v. Craig*, 497 U.S. 836, 836 (1990).

88. *Id.* at 844.

89. *Id.* at 845.

‘greatest legal engine ever invented for the discovery of truth’; [and] (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”<sup>90</sup>

Justice O’Connor noted that the “combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings.”<sup>91</sup>

Importantly, however, “[a]lthough face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ we have nevertheless recognized that it is not the *sine qua non* of the confrontation right.”<sup>92</sup> Justice O’Connor noted that “[t]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.”<sup>93</sup> Simply put, “our precedents establish that “the Confrontation Clause reflects a preference for face-to-face confrontation at trial,” a preference that “must occasionally give way to considerations of public policy and the necessities of the case.”<sup>94</sup> Consequently, although the Clause “prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial,” the Court found that the statute in question “preserves all of the other

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90. *Id.* at 845-846 (quoting *California v. Green* 399 U.S. 149, 158 (1970) (brackets in original)) (internal citations omitted).

91. *Id.* at 846.

92. *Id.* at 847 (quoting *Green*, 399 U.S. 149 at 157) (internal citation omitted).

93. *Id.* (brackets in original). Justice O’Connor further stated:

There is doubtless reason for saying that . . . if notes of [the witness’] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

*Id.* at 3165.

94. *Id.* at 849 (emphasis in original) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

elements of the confrontation right,” as a child “must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.”<sup>95</sup> Furthermore, the state has a “substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.”<sup>96</sup>

Justice Scalia drafted a compelling dissent, stating that “[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”<sup>97</sup> Moreover, the “Sixth Amendment provides, with unmistakable clarity, that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’”<sup>98</sup> Justice Scalia explained the implications of the Court’s holding as follows:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State’s child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, “it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?” Perhaps that is a procedure today’s society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.<sup>99</sup>

Consequently, because “the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current ‘widespread belief’” that child defendants will be traumatized when confronting their alleged perpetrators in Court, Justice

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95. *Id.* at 851.

96. *Id.* at 852.

97. *Id.* at 860 (Scalia, J., dissenting).

98. *Id.* at 860-61 (*quoting* U.S. Const., amend. VI).

99. *Id.* at 861.



Scalia would have invalidated the statute.<sup>100</sup>

Justice Scalia also rejected the argument that the statute was intended to protect the “physical and psychological well-being of child abuse victims,”<sup>101</sup> stating as follows:

A child who meets the Maryland statute’s requirement of suffering such “serious emotional distress” from confrontation that he ‘cannot reasonably communicate’ would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State’s own fault. Protection of the child’s interest—as far as the Confrontation Clause is concerned—is entirely within Maryland’s control. The State’s interest here is in fact no more and no less than what the State’s interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.<sup>102</sup>

Justice Scalia also emphasized that “[t]he ‘special’ reasons that exist for suspending one of the usual guarantees of reliability in the case of children’s testimony are perhaps matched by ‘special’ reasons for being particularly insistent upon it in the case of children’s testimony,” as “studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.”<sup>103</sup> Perhaps most importantly, as Justice Scalia noted, the Court is not free to “conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.”<sup>104</sup>

## 2. *Crawford v. Washington*: Admissibility of Statements Made Outside of Court

In *Crawford*, Justice Scalia drafted the majority opinion holding that testimonial statements made outside of court are barred by the

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100. *Id.*

101. *Id.* at 867.

102. *Id.*

103. *Id.* at 867-68. Justice Scalia further stated:

The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals.

*Id.* at 870.

104. *Id.* at 870.

Confrontation Clause regardless of their reliability, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witnesses.<sup>105</sup> Justice Scalia began by stating that the “Constitution’s text does not alone resolve this case” because “[o]ne could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial . . . those whose statements are offered at trial . . . or something in-between.”<sup>106</sup> Turning to the historical record leading to the Clause’s adoption, Justice Scalia noted that the “common-law tradition is one of live testimony in court subject to adversarial testing,” although “England at times adopted elements of the civil-law practice,” in which witness statements “were sometimes read in court in lieu of live testimony.”<sup>107</sup>

Importantly, however, “[t]hrough a series of statutory and judicial reforms, English law developed a right of confrontation” that limited the instances in which witness statements could be read in court.<sup>108</sup> In addition, courts “developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person.”<sup>109</sup> Furthermore, decisions in the years following the Confrontation Clause’s adoption held that “depositions could be read against an accused only if they were taken in his presence,” emphasizing that “[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”<sup>110</sup> In fact, “[s]ome early cases went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine,” although most held that “admissibility depended on a prior opportunity for cross-examination.”<sup>111</sup>

Moreover, the purpose of the Confrontation Clause was to enable a defendant to cross-examine witnesses and thereby expose flaws in their testimony:

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion

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105. *Crawford v. Washington*, 541 U.S. 36, 36 (2004).

106. *Id.* at 42-43.

107. *Id.* at 43.

108. *Id.* at 44.

109. *Id.* at 45.

110. *Id.* at 49 (internal citations omitted).

111. *Id.* at 50. (emphasis in original).

of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.<sup>112</sup>

In essence, the Framers rejected a “framework . . . so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”<sup>113</sup> Accordingly, the historical record supports the proposition “that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>114</sup>

### 3. *Melendez-Diaz v. Massachusetts*: Admissibility of Affidavits in Relation to the Confrontation Clause

In *Melendez-Diaz*, the Court engaged in, according to Justice Scalia’s view, “little more than the application of our holding in *Crawford v. Washington*.”<sup>115</sup> The issue before the Court was whether affidavits (certificates) of forensic drug analysts were testimonial under *Crawford*, and thus required that the state prosecutor offer the analysts for cross-examination under the Confrontation Clause<sup>116</sup> as applied to state actors.<sup>117</sup>

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>118</sup> Justice Scalia then disassembled each of the “potpourri”<sup>119</sup> of arguments interposed by the government and the dissenters. The government offered that the analysts were not “accusatory” witnesses, inasmuch as they did not “directly accuse” the defendant and only offered evidence, the drug testing results, that must then be coupled with other evidence.<sup>120</sup> Justice Scalia dispatched that argument with his characteristically originalist retort: “This finds no support in the text of the Sixth Amendment . . . .”<sup>121</sup> He

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112. *Id.* Justice Scalia also noted that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” *Id.* at 61.

113. *Id.* at 63.

114. *Id.* at 53-54.

115. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

116. *Id.* at 305.

117. *Id.*

118. U.S. Const. amend. VI.

119. *Melendez-Diaz*, 557 U.S. at 312.

120. *Id.* at 313.

121. *Id.*

provided additional textualist support by quoting *Crawford*:

To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination . . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.<sup>122</sup>

Then, to underscore the point, Justice Scalia brings the textual analysis full circle: "[T]he Constitution guarantees one way [to test testimonial reliability]: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available."<sup>123</sup> Law enforcement convenience and prosecutorial expedience do not bend to the textual dictates of the Constitution: "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the [constitutionally guaranteed] right to trial by jury and the privilege against self-incrimination."<sup>124</sup>

Justice Scalia always began and ended his Sixth Amendment analyses with the text of the Constitution and the original intents of the Framers and Ratifiers.<sup>125</sup> His Sixth Amendment opinions were not vehicles to favor a conservative or law enforcement and prosecution agenda; they arose and were delimited—always—by the text of the document. Perhaps Justice Scalia's most telling quote in this regard arose in *Maryland v. King* during oral argument.<sup>126</sup> In *King*, the issue was whether DNA samples collected from felony arrestees (not convicted) violated the Fourth Amendment.<sup>127</sup> Witness Justice Scalia's abject rejection of expedience and the State's interests over the criminal defendant's constitutional guarantees in the following excerpt from attorney for Maryland Katherine Winfree's oral argument and Justice Scalia's mocking retort:

Attorney Winfree: Since 2009, when Maryland began to collect DNA samples from arrestees charged with violent crimes and burglary, there had been 225 matches, 75 prosecutions and 42 convictions, including

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122. *Id.* at 317-18 (quoting *Crawford*, 541 U.S. at 61-62).

123. *Id.* at 318.

124. *Id.* at 325.

125. *See id.* at 325-38.

126. Transcript of Oral Argument at \*3, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207).

127. *King*, 133 S. Ct. at 1966.

that of Respondent King.

Justice Scalia: Well, that's really good. I'll bet you if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too.<sup>128</sup>

Justice Scalia rarely wavered from his textual and originalist viewpoint regarding criminal defendants' rights.<sup>129</sup> And when he wavered, it was only when he was writing for the majority and had to cobble together enough justices to prevail.<sup>130</sup>

#### 4. *Apprendi v. New Jersey*: What Must be Proven Beyond a Reasonable Doubt

In *Apprendi*, the Court wrestled with the extent of the facts a prosecutor must prove beyond a reasonable doubt to a jury absent the defendant's waiver of jury trial.<sup>131</sup> The majority held that not only all elements of the crime must be proved to a jury beyond a reasonable doubt,<sup>132</sup> but all facts, other than prior convictions, that increase the crime's penalty beyond the legislatively prescribed statutory maximum must also be found by the jury beyond a reasonable doubt.<sup>133</sup>

Justice Scalia echoed the majority's decision and much of its sentiment, but in an uncharacteristically short concurrence, he explained the unitary reasoning he would have used to resolve the case: originalism and textualism.<sup>134</sup> Justice Scalia insisted there was "no coherent alternative" to the holding that the right to trial by jury includes a right to have a jury decide all facts that enhance the sentence beyond the statutory maximum, and to have that decision made beyond a reasonable doubt.<sup>135</sup> Justice Scalia ended his concurrence with a broadside aimed at dissenting Justice Breyer's judicial activism:

Justice Breyer proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial,

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128. Transcript of Oral Argument, *supra* note 126, at 3.

129. See *King*, 133 S. Ct. at 1989-990 (Scalia, dissenting). See also *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000).

130. See *Crawford v. Washington*, 541 U.S. 36 (2004). See also *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Jones*, 565 U.S. 400, 404 (2012).

131. *Apprendi*, 530 U.S. at 466 (2000).

132. *Id.*

133. *Id.*

134. *Id.* at 498-99 (Scalia, J., concurring).

135. *Id.* at 499.

by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.<sup>136</sup>

Justice Scalia's consistency in construing criminal defendants' rights through the lenses of the text of the Constitution and the original intents of the Framers and Ratifiers does not permit him to engage in the sorts of ends-means pseudo-jurisprudence that some of his fellow Justices routinely employ. Justice Scalia recognized that textualism and originalism are not bare legal theories but are, on the contrary, compelled by the nature of the Constitution itself as a contract between the People and their Government. The Constitution embodies that agreement. To the extent the Government adheres to the limits imposed by the Constitution and its amendments, the Government retains its right to govern. But if the Government fails to adhere to the constitutional protections that were quid pro quo for its ratification, the Government loses its right to govern.

Justice Scalia also recognized that the Framers incorporated within the Constitution the procedures that must be used to amend it. The Framers did not incorporate judicial activism or evolving senses of decency or penumbras; rather, the Constitution provides that any changes to the Constitution—the agreement between the People and their Government—may only be made through the constitutional amendment process as ratified by the People. Amendments by judicial fiat are constitutionally invalid.

##### 5. *Ring v. Arizona*: What Must be Found by a Jury

In *Ring*, the Court invalidated a statute that, following an adjudication of guilt by a jury of first-degree murder, authorized the trial court to singlehandedly determine the presence or absence of the aggravating factors required by Arizona law to support imposition of the death penalty.<sup>137</sup> The Court held that the statute violated a defendant's Sixth Amendment right to a jury trial in capital prosecutions, stating that "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury."<sup>138</sup> Thus, even though "judicial authority over the finding of aggravating factors 'may . . . be a better way to guarantee against the arbitrary imposition of the death penalty,'" the Sixth Amendment right to a jury

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136. *Id.*

137. *Ring v. Arizona*, 536 U.S. 584, 585 (2002).

138. *Id.* at 605.

trial “does not turn on the relative rationality, fairness, or efficiency of potential factfinders.”<sup>139</sup>

Justice Scalia issued a concurring opinion, stating that:

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.<sup>140</sup>

Justice Scalia emphasized that:

[T]he accelerating propensity of both state and federal legislatures to adopt “sentencing factors” determined by judges that increase punishment beyond what is authorized by the jury’s verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, cause me to believe that our people’s traditional belief in the right of trial by jury is in perilous decline.<sup>141</sup>

This state of affairs would certainly be made worse “by the repeated spectacle of a man’s going to his death because a judge found that an aggravating factor existed.”<sup>142</sup>

### *C. Justice Scalia’s Originalism in the Eighth Amendment Context*

Justice Scalia’s Eighth Amendment Cruel and Unusual Punishments Clause jurisprudence is as bound up with the original intent of the Framers and Ratifiers as are his jurisprudence in other areas of criminal defendants’ rights. He maintains throughout that the “cruel and unusual punishments” forbade by the Framers through the Eighth Amendment were those punishments that were “modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”<sup>143</sup> Justice Scalia did not craft his arguments to achieve one conservative agenda or another; rather, he crafted his arguments in the Eighth Amendment context to honor the Constitution, the contract between the People and their Government, in its originally intended meaning. He rejected the “death is different” mantra of much of the Court, which used the mantra to justify setting

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139. *Id.* at 607.

140. *Id.* at 610 (Scalia, J., concurring).

141. *Id.* at 611-12.

142. *Id.* at 612 (emphasis in original).

143. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (quoted in *Roper v. Simmons*, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting)).

and resetting the “cruel and unusual punishments” bar wherever those Justices thought it morally belonged, thus ignoring the Framers’ and Ratifiers’ original intents and the People’s adoption thereof at the time.

### 1. *Atkins v. Virginia*: What is Considered Cruel and Unusual

*Atkins v. Virginia* gave life to the principal enumerated in the *Trop v. Dulles*<sup>144</sup> holding in 1958 that the contours of “cruel and unusual punishments” were malleable and could be discerned by reading the “evolving standards of decency that mark the progress of a maturing society.”<sup>145</sup> In *Atkins*, the issue before the Court was whether executing a mentally retarded murder defendant was, by virtue of the mental status of the accused, perforce a cruel and unusual punishment.<sup>146</sup> The theory went that if capital punishment was to be reserved for the “worst of the worst,” a mentally retarded defendant could never fit that category because of the mental deficit, thus rendering execution disproportional to the culpability and blameworthiness.<sup>147</sup> In *Atkins*, the majority, while also rejecting the applicability of deterrence and retribution rationales of punishment as to mentally retarded defendants,<sup>148</sup> rested its analysis in large part on the trend of state legislative enactments rejecting execution of mentally retarded defendants.<sup>149</sup> The majority of the Court held that the trend reflected the “evolving standards of decency,” and thus, any state legislative enactment in opposition to that trend and allowing execution of mentally retarded defendants was cruel, unusual, and unconstitutional.<sup>150</sup>

Justice Scalia found that reasoning to evidence only the majority’s activism, ends-over-means reasoning, and hubris: “Today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence [and] find[s] no support in the text or history of the Eighth Amendment . . . . Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”<sup>151</sup> Justice Scalia found the majority’s decision and reasoning much more social engineering than the constitutional jurisprudence it should have been. Lest his position be left less than clear, Justice Scalia then labeled the majority’s

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144. *Trop v. Dulles*, 356 U.S. 86, 100-02 (1958).

145. *Id.* at 101; *Atkins v. Virginia*, 536 U.S. 304, 311-312 (2002).

146. *Atkins*, 536 U.S. at 306-07.

147. *Id.* at 317-21.

148. *Id.* at 319-21.

149. *Id.* at 313-17.

150. *Id.* at 312, 321.

151. *Id.* at 337-38 (Scalia, J., dissenting).



reasoning as based on “embarrassingly feeble evidence,”<sup>152</sup> and a result of “thrashing about for evidence,”<sup>153</sup> but saved “the Prize for the Court’s Most Feeble Effort to fabricate”<sup>154</sup> label to affix to the majority’s use of professional and religious groups, the “world community,” and opinion polls.<sup>155</sup>

Providing a history lesson, Justice Scalia explained that at the time of ratification, only “*severely or profoundly* mentally retarded” were relieved of criminal punishments for their crimes.<sup>156</sup> He noted that mentally retarded persons with less severe deficits were eligible for the death penalty.<sup>157</sup> Justice Scalia also bemoaned what he saw as the arrogance of the majority, which supplanted the People’s conception of cruel and unusual punishments with its own.<sup>158</sup> The majority admitted that it had done just that: “[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>159</sup> A bemused but not amused Justice Scalia found that the majority, in applying that reasoning and in executing that power grab, must “presumably” feel that they are “really good lawyers . . . . The arrogance of this assumption of power takes one’s breath away.”<sup>160</sup>

In his *Atkins* dissent, as with his Fourth and Sixth Amendment position, Justice Scalia focused steadfastly on one overarching principle: the Government has only those powers the People provided to it within the Constitution, and those powers and their limits cannot be changed without the consent of the People; judicial fiat is not constitutional amendment.<sup>161</sup>

## 2. *Roper v. Simmons*: Cruel and Unusual Punishment—The Death Penalty for Defendants Under the Age of Eighteen

In *Roper v. Simmons*, a majority of the Court, speaking through Justice Anthony Kenney, held that execution of a murder defendant who

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152. *Id.* at 344 (Scalia, J., dissenting).

153. *Id.* at 346 (Scalia, J., dissenting).

154. *Id.* at 347 (Scalia, J., dissenting).

155. *Id.* at 348 (Scalia, J., dissenting).

156. *Id.* at 340 (Scalia, J., dissenting) (*italics in original*) (explaining that “severely or profoundly mentally retarded” persons “generally had an IQ of 25 or below”).

157. *Id.* at 351-54.

158. *Id.* at 337.

159. *Id.* at 312 (*quoting Coker v. Georgia*, 433 U.S. 584, 597 (1977)) (*quoting Atkins*, 536 U.S. at 348 (Scalia, J., dissenting)).

160. *Id.* at 348 (Scalia, J., dissenting).

161. *Id.* at 339-40, 348-50 (Scalia, J., dissenting).

was under eighteen years of age at the time of the incident was unconstitutional as a cruel and unusual punishment.<sup>162</sup> The majority continued its *Atkins* strategy in replacing constitutional precepts with the Justices' preferences.<sup>163</sup> As in *Atkins*, the Court in *Simmons* tallied state legislative enactments regarding execution of juvenile murderers, and found not a majority or even a strong trend, but found that at least there was a "consistent direction of change."<sup>164</sup>

Justice Scalia predictably bridled at the majority's hubris in expressly overruling the contrary decision decided just fifteen years earlier in *Stanford v. Kentucky*,<sup>165</sup> and cited Founding Father Alexander Hamilton in support:

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this . . . . But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectations, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years – not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution has *changed* . . . . Worse still, the [majority of the] Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment . . . . The Court thus proclaims itself the sole arbiter of our Nation's moral standards."<sup>166</sup>

True to form, Justice Scalia harkens not to conservative or any other political or moral agendas, but to the text of the Constitution and the intents of the Framers and Ratifiers. The majority's self-absorbed strategy, wrenching these decisions away from the People, violates the spirit and the text of the Constitution. Justice Scalia saw that and was not shy about pointing it out: "[A]ll the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends."<sup>167</sup>

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162. *Roper v. Simmons*, 543 U.S. 551, 551 (2005).

163. *See Atkins*, 536 U.S. at 312.

164. *Roper*, 543 U.S. at 533, 566-67.

165. *Stanford v. Kentucky*, 492 U.S. 361, 361 (1989).

166. *Roper*, 543 U.S. at 607-08 (Scalia, J., dissenting) (*quoting* ALEXANDER HAMILTON, THE FEDERALIST, NO. 78, at 465 C. Rossiter ed. 1961)).

167. *Id.* at 617 (Scalia, J., dissenting).

### 3. *Montgomery v. Louisiana*: Cruel and Unusual Punishment— Life Without Parole for Those Under the Age of Eighteen

In *Miller v. Alabama*, a majority of the Court held that mandatory life without parole (“LWOP”) sentences, as applied to offenders who were juveniles on the date of their offenses, were unconstitutional in violation of the Eighth Amendment’s Cruel and Unusual Punishments clause.<sup>168</sup> In *Miller*, Justice Scalia did not author a separate dissenting opinion, but joined in the separate dissents of Chief Justice Roberts and Justices Thomas and Alito.<sup>169</sup>

In *Montgomery v. Louisiana*, after the appellant had spent forty-six years in prison on a LWOP sentence for a crime he had committed when he was seventeen years old, the majority held that the *Miller* decision was retroactive on state collateral review, because the *Miller* case created a new “substantive rule of constitutional law.”<sup>170</sup> Query how the Court has the power to enact a “new substantive constitutional rule” without any amendment process whatever – but, we digress.

After referring to the majority’s holding and reasoning as a “nothing short of astonishing,”<sup>171</sup> “sleight of hand,”<sup>172</sup> Justice Scalia showed the rest of his cards: “This whole exercise [embodied in the majority’s holding, reasoning, and remedy], this whole distortion of *Miller*, is just a devious way of eliminating life without parole for juvenile offenders.”<sup>173</sup> Indeed, “[t]his Court has no jurisdiction to decide this case, and the decision it arrives at is wrong. I respectfully dissent.”<sup>174</sup>

Justice Scalia’s death penalty jurisprudence was not heavy-handed, prosecution-favoring, or conservative; instead, it was driven by a steadfast, textual, and historical application of the Eighth Amendment—as drafted and ratified. Justice Scalia saw the majority’s repeated incursions into State’s rights and legislative power and the majority’s recurrent rulings that ignored the People’s wishes and the Constitution’s requirements as unconstitutional and anti-democratic. Particularly given the one-way ratchet<sup>175</sup> that results when the Court, through its majority,

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168. *Miller v. Alabama*, 132 S. Ct. 2455, 2457-58 (2012).

169. *Id.* at 2477-90.

170. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736-37 (2016).

171. *Id.* at 737 (Scalia, J., dissenting).

172. *Id.* at 740 (Scalia, J., dissenting).

173. *Id.* at 744 (Scalia, J., dissenting).

174. *Id.* at 737 (Scalia, J., dissenting).

175. *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting). “[W]here the punishment is in itself permissible, ‘[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling

declares an entire category of offenders exempt from capital punishment, the Court's constitutional amendment-by-opinion "jurisprudence" is constitutional redesign without the People's consent and ratification.

#### IV. JUSTICE SCALIA'S ENDURING LEGACY

*If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong.*<sup>176</sup>

Justice Scalia's decisions in the above cases undermine the argument that his decisions are based on his conservative values. This is not to say that Justice Scalia's decisions have never aligned with his policy positions, as his opinions in the death penalty context illustrate. It is to say, however, that the outcomes Justice Scalia reaches are based on his interpretive philosophy, not his ideological disposition. Although some may argue that Justice Scalia relies on originalism precisely because it allows him to reach politically-motivated outcomes, his decisions in cases such as those above undercut that proposition. If Justice Scalia were primarily outcome-driven, one would not expect him to reach decisions that, in the Fourth Amendment context, safeguard arrestees' privacy rights and curtail law enforcement's investigatory powers, and in the Sixth Amendment context ensure fairer procedures for criminal defendants at trial. Furthermore, when interpreting these and other constitutional provisions, Justice Scalia relied almost exclusively on the text, purpose, and historical record, not on judicially-created "penumbras" or "rights" that the Court, in cases such as *Planned Parenthood*, had invented out of thin air or expanded to alarming proportions. In so doing, Justice Scalia embraced a limited view of the Court's Article III reviewing power, and reached outcomes that were entirely at odds with his subjective values. In fact, if any doubt remains regarding the motives underlying Justice Scalia's decision-making, one only need to recall *Texas v. Johnson*, in which Justice Scalia joined the majority opinion of Justice William Brennan that invalidated a law banning the burning of the American Flag.<sup>177</sup> In that opinion, Justice

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the States from giving effect to altered beliefs and responding to changed social conditions.'" *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (Scalia, J., writing for the majority)).

176. Spiering, *supra* note 17.

177. *Texas v. Johnson*, 491 U.S. 397 (1989).

Brennan stated as follows:

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong . . . . And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.<sup>178</sup>

Years later, Justice Scalia acknowledged that the decision was contrary to his personal beliefs, but commanded by the language of purposes of First Amendment, stating “[i]f it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I am not king.”<sup>179</sup> Likewise, in *Employment Division v. Smith*, one would not have expected Justice Scalia, a devout Roman Catholic, to hold that the Free Exercise Clause of the First Amendment did not permit religious organizations to refuse to comply with generally applicable laws, even if such law incidentally burdened an organization's religious beliefs.<sup>180</sup> Yet, that is precisely what Justice Scalia did. Drafting the opinion on behalf of the majority, Scalia stated as follows:

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).” We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1878) where we rejected the claim that criminal laws against

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178. *Id.* at 419-20.

179. Scott Bomboy, *Justice Scalia Rails Again About Flag-Burning ‘Weirdos’*, Constitution Center (Nov. 12, 2015), available at: <http://blog.constitutioncenter.org/2015/11/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes/>

180. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>181</sup>

Given that Justice Scalia reached such outcomes despite his personal values, why would anyone suspect that he based other decisions primarily on ideological grounds? It simply does not make sense. What does make sense, however, is the proposition that the Court’s liberal-leaning Justices often decide cases based, at least in part, on their policy predilections. For example, in *every* case involving abortion, Justice Ruth Bader Ginsburg has voted to invalidate state restrictions imposing limitations on or restricting access to abortion services, even though the abortion right was based on an outright manipulation of the Fourteenth Amendment’s text.<sup>182</sup> Likewise, in *every* case involving the death penalty, former Justice William Brennan voted to invalidate statutes authorizing the death penalty in *every* case, even though the death penalty, at least in theory and regardless of one’s views as a policy matter, is unquestionably constitutional.<sup>183</sup> Similarly, Justice Kennedy has relied on the Fourteenth Amendment to invalidate laws outlawing sodomy and banning same-sex marriage based on the notion of liberty “in its spatial and more transcendent dimensions,” despite conceding that “a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty.”<sup>184</sup> Well, the Fourteenth Amendment compels, not merely suggests, that result. This is not to say that the outcomes in *Roe*, *Lawrence*, and *Obergefell* were not desirable. It is to say that the Court had no authority to reach those outcomes.

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181. *Id.* at 878-79.

182. *See* Stenberg v. Carhart, 530 U.S. 914, 945-46 (2000); Gonzales v. Carhart, 550 U.S. 124, 169-91 (2007).

183. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279, 320 (Brennan, J., dissenting) (1987) (stating that “adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case”); *see also* U.S. Const., amend. XIV (because the Fourteenth Amendment prevents the state from depriving citizens of “life, liberty or property without due process of law,” the Founders implicitly viewed the death penalty as constitutional) (emphasis added).

184. *Planned Parenthood v. Casey*, 505 U.S. 833 at 846 (1992).

Ultimately, Justice Scalia's decisions reflect an approach to constitutional interpretation that embraces humility and respect for the Constitution and the rule of law. To begin with, from his opinions it is not difficult to discern that Justice Scalia believed that a judge's power is inherently limited in a democratic society. Scalia did not believe that nine unelected, life-tenured judges should possess the authority to create unenumerated "rights" (e.g., abortion, assisted suicide) that no words in the Constitution could support or that, by virtue of the Constitution's silence on a particular issue, were left to the people to decide through the democratic process. In *Obergefell*, Justice Scalia stated as follows:

It is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>185</sup>

Justice Scalia did not mince words, declaring that the majority's opinion "is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government."<sup>186</sup> For Justice Scalia, the Court abuses its power when it essentially re-writes through case law what the Framers sought to achieve through the amendment process. This type of decision-making also ignored the fact that power belongs to the people, and the concept of de-centralization enables that power to flow from the bottom-up, not the top down. Decisions such as *Obergefell* replaced de-centralization with centralization, and substituted the normative judgments of hundreds of millions of people with the policy preferences of a handful of unaccountable jurists. How's that for a democracy?

Additionally, Justice Scalia revered the Constitution and the rule of law. The Constitution's text, in Scalia's view, served just as much to limit the Court's power as it did to authorize judicial review. The governance structure that the Founders envisioned—a democratic

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185. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627-28 (2015).

186. *Id.* at 2629 (emphasis in original).

republic—did not enable judges to right every wrong, fashion a remedy for every perceived injury, or engage in legal jujitsu to achieve outcomes that were predicated on little more than subjective values. Rather, the Constitution—through both structural and individual rights provisions—delineated the contours of the Judiciary’s reviewing power, and that power was limited by what the words said—and *what they didn’t say*. As Justice Scalia once said, “[w]ords have meaning. And their meaning doesn’t change.”<sup>187</sup> And there is no such thing as a moderate or middle-ground approach to interpreting the text, which is something that judicial pragmatists would like people to believe. As Justice Scalia stated, “[w]hat is a moderate interpretation of the text? Halfway between what it really means and what you’d like it to mean?”<sup>188</sup>

In the final analysis, there is one proposition that citizens of all political persuasions should support: the Court does not have the authority to manipulate or ignore the text, and when the Constitution is silent on an issue, the Court’s obligation is to leave such an issue to the democratic and political process. In the same way, the doctrine of *stare decisis* exists to promote respect for precedent, promote certainty and predictability in the law, and constrain future members of the Court from simply overturning precedent because they disagreed with the outcome. The law—and the Court itself—is bigger than the policy predilections of a majority because the Founders envisioned a country of laws, not men. When constitutional interpretation is approached with these principles in mind, power flows all the way down to the people, democracy trumps oligarchy, and the will of the people trumps the will of the powerful.

## V. CONCLUSION

*Toward the end of the opera Scalia/Ginsburg, tenor Scalia and soprano Ginsburg sing a duet: “We are different, we are one,” different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve. From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots—the “applesauce” and “argle barge”—and gave me just what I needed to strengthen the majority*

187. Jennifer Senior, *In Conversation: Antonin Scalia*, New York Magazine (Oct. 6, 2013), available at: <http://nymag.com/news/features/antonin-scalia-2013-10/>.

188. Clare Booth, *Irreplaceable Justice Antonin Scalia* (Feb. 17, 2016), available at: <https://cblpi.org/irreplaceable-justice-antonin-scalia/>.



*opinion. He was a jurist of captivating brilliance and wit, with a rare talent to make even the most sober judge laugh. The press referred to his “energetic fervor,” “astringent intellect,” “peppery prose,” “acumen,” and “affability,” all apt descriptions. He was eminently quotable, his pungent opinions so clearly stated that his words never slipped from the reader’s grasp.*

*Justice Ruth Bader Ginsburg*

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Justice Scalia was not perfect—no one is—but he was not a dishonest jurist. As one commentator explains:

If Scalia was a champion of those rights [for criminal defendants, arrestees], he was an accidental champion, a jurist with a deeper objective—namely, fidelity to what he dubbed the “original meaning” reflected in the text of the Constitution—that happened to intersect with the interests of the accused at some points in the constellation of criminal law and procedure.<sup>189</sup>

Indeed, Justice Scalia is “more easily remembered not as a champion of the little guy, the voiceless, and the downtrodden, but rather, as Texas Gov. Greg Abbott said, an ‘unwavering defender of the written Constitution.’”<sup>190</sup>

Justice Scalia’s frustration with the Court was certainly evident at times during his tenure, and understandably so. In *United States v. Windsor*, Scalia lamented as follows:

We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do. Some will rejoice in today’s decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better.<sup>191</sup>

The above passage captures the essence of Justice Scalia’s philosophy, and the enduring legacy that will carry forward for many

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189. Robert J. Smith, *Antonin Scalia’s Other Legacy*, Slate, available at: [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/antonin\\_scalia\\_was\\_often\\_a\\_friend\\_of\\_criminal\\_defendants.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html) (brackets added).

190. *Id.*

191. *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2012) (Scalia, J., dissenting) (emphasis added).

years after his death. At the end of the day, Justice Scalia, whether through well-reasoned decisions, blistering dissents, or witty comments at oral argument, spoke a truth that transcends time: “[m]ore important than your obligation to follow your conscience, or at least prior to it, is your obligation to form your conscience correctly.”<sup>192</sup> Most importantly, “[h]ave the courage to have your wisdom regarded as stupidity . . . and have the courage to suffer the contempt of the sophisticated world.”<sup>193</sup> You will be missed, Justice Scalia. You left the Court—and the law—better than it was before you arrived.

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192. Spiering, *supra* note 17, available at: <http://www.breitbart.com/big-government/2016/02/13/supreme-court-justice-antonin-scalias-greatest-quotes/>.

193. Ken McIntyre, *The Wit and Wisdom of Scalia: Nine Zingers*, *Newsweek* (Feb. 14, 2016), available at: <http://www.newsweek.com/wit-wisdom-antonin-scalia-426548>.